

Victim-Centred Transitional Justice in Sri Lanka: What Does It Really Mean?

DISCUSSION PAPER

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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Introduction

The terms ‘victim centered’, ‘centrality of victims’ or ‘victim participation’ are frequently used in discourse around transitional justice. There is now a growing consensus that victims must be at the heart of any transitional justice process. Since 2015 and the government’s promise to introduce transitional justice mechanisms in Sri Lanka, these terms have been used by varied stakeholders. The Centre for Policy Alternatives (CPA) has consistently called for a victim-centered approach in Sri Lanka and is not alone in this regard. The tenets of such an approach, however, require further elaboration. International instruments provide guidance as to the legal framework, but the nature of victimhood and its practical implications are subject to contestation and vary from context to context.

The present report seeks to provide some clarification, exploring both the genealogy of victim-centered transitional justice and models for implementation within Sri Lanka. By unpacking the term “victim-centered,” CPA hopes to launch a conversation and focus greater attention on the issues relevant to victim participation, protection, and agency in Sri Lanka. CPA will examine the status of victims, the origins of the term victim-centered, and current international standards. We also examine the issue of standing before the judicial mechanism, in particular, the process by which international tribunals have granted special status to specific groups of victims. We then turn to the question of victim and witness protection, evaluating examples from other countries and identifying gaps in Sri Lanka’s current law. Subsequently, specific proposals are made in relation to marginalization and non-recurrence. Finally, we identify areas for further inquiry and provide recommendations.

CPA believes this to be an important conversation in the context of the government’s promises to introduce new mechanisms and initiatives to address past abuses. The recommendations presented should be a starting point for further discussion and follow-up action.

I. Defining Victimhood: Inherent Challenges

At the outset it must be stated that victim-centered transitional justice should prioritize victims' rights, needs, and interests. Victims should be given opportunities to participate at each stage of the process and at all levels of decision-making. Mechanisms should place victims' dignity at the forefront, ensuring that all feel welcome, respected, and safe. The definition of the word victim itself, however, is complicated for a number of reasons:

1. Victims are not a monolithic group, and they should not be expected to speak in a unified voice. The organization Impunity Watch warns of "the risk of homogenisation and essentialisation of victimhood".¹ It is important to recognize the multiplicity of voices and ensure that all are given an opportunity to speak. In the Sri Lankan context, there are victims spanning decades, representing all ethnic and religious groups and from across the country. Victims range from those affected by abuses before the war commenced, during the war and post-war. Care must be taken to ensure that future mechanisms and initiatives do not prevent a victim from engaging due to administrative, political or other impediments. Furthermore, mechanisms must also be gender-sensitive and attuned to sexual and gender-based violence as well as the range of other violations women have experienced.
2. The term victim can have passive connotations. Victims are often regarded as objects rather than subjects in transitional justice processes. For that reason, it is necessary to recognize the agency of victims and be wary of others who claim to speak on their behalf. A truly victim-centered process will recognize and engage victims as active participants.
3. The claim to victimhood can be politically charged. Conflicts may arise within and between communities over who should be included in this category and which violations should be prioritized. Some may only want to focus on the final stage of the war, brushing aside previous episodes of violence. Others may only want to focus on specific types of violations such as shelling of hospitals, sexual violence or torture. In such a context, there is a widespread perception among victims from earlier years such as from the insurrection in the south, that more attention has been on the last stage of the war with their plight often forgotten or ignored.

The ethnic dimension in relation to past abuses and victimhood is evident in many discourses. For example, a dominant narrative has emerged on the last stage of the war with a focus on the victimhood of the Tamil community. In contrast, Muslims who were forcibly evicted by the LTTE or Sinhalese villages massacred by the same group or victims due to state repression in the South have not received the same attention. Similarly, tensions are present around identifying the perpetrators and links to accountability. For example, the intense hostilities of the last stage involving both the Government forces and the LTTE has resulted in allegations against both parties of violations of international

¹ Impunity Watch, *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?*, Utrecht, The Netherlands: Impunity Watch, 2014, http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf.

human rights law and international humanitarian law.² The momentum for this grew with victim groups, sections of civil society and sections of the diaspora calling for accountability. Polarization was evident with large sections of the Tamil diaspora conducting public protests during the last stage of the war and post-war period with allegations of genocide of the Tamil community including at the United Nations Human Rights Council sessions. Notable in most if not all such protests and advocacy efforts is the absence of criticism of the LTTE and their own abuses including child recruitment and political assassinations. Similarly, polarized messages were present with sections of the Sinhala diaspora actively supporting the then regime's military strategies and the defence of a 'humanitarian operation', with silence on violations attributed to the security forces. Thus, victimhood and related issues of accountability and identity are often politically charged and tinged with an ethnic bias, dominated by narratives reinforced by actors with their own agendas.

Sometimes the line between victim and perpetrator may be blurred; sometimes an individual, such as a forcibly recruited LTTE cadre, may have played both roles in the conflict. Furthermore, several former cadres also face continued harassment and surveillance by intelligence services.³ This blurring of lines must be factored in when designing and implementing transitional justice policies and mechanisms, recognising the complexities of victimhood and ensuring steps are taken to mitigate re-victimisation. In addition, there is the possibility of some individuals making false or exaggerated statements as victim status can confer specific benefits, including standing in court, protection, and reparations. This possibility must be factored in when designing mechanisms and assistance schemes, ensuring steps are taken to protect the credibility of the transitional justice process.

Furthermore, claims to victimhood can also serve nationalist agendas. In the Sri Lankan context, nationalist agendas in both the North and the South have influenced transitional justice debates, recently evidenced around the establishment of the Office for Missing Persons (OMP) and the UN Human Rights Council Resolution.⁴ This is likely to be exacerbated with particular groups trying to dominate and manipulate the narrative of past abuses and issues of accountability, thus attempting to define victimhood. The so-called "politics of victimhood," through which the identity of victim is defined and restricted to serve political ends, can polarize communities, create further tensions, and re-traumatize those who have already suffered.⁵

² Independent investigations conducted so far, including UN reports indicate to evidence of international crimes requiring further investigations. See for example, Report of The Secretary-General's Panel of Experts On Accountability In Sri Lanka, 31 March 2011; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the OHCHR Investigation on Sri Lanka (OISL)*, A/HRC/30/CRP.2, New York: United Nations, 16 Sept. 2015.

³ Consultation Task Force on Reconciliation Mechanisms (CTF), *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Volume I, Colombo: CTF, 17 Nov. 2016.

⁴ See Bhavani Fonseka & Luwie Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, Colombo: CPA, January 2016.

⁵ Kimberly Theidon, "Histories of Innocence: Post-War Stories in Peru," *Localizing Transitional Justice*, edited by Rosalind Shaw, Lars Waldorf, and Pierre Hazan, Stanford University Press, 2010, 92-110; Mijke de Waardt, "Naming and Shaming Victims: The Semantics of Victimhood," *International Journal of Transitional Justice* 10(3) (2016): 432-450.

4. The definition of victim will vary in the context of specific mechanisms. Sri Lanka agreed in UN Human Rights Council resolution 30/1 to establish four transitional justice mechanisms: the OMP; a truth and reconciliation commission (TRC); a judicial mechanism with a special counsel; and an office of reparations. While CPA notes that all four mechanisms should be victim-centered, the implications of the term “victim” will differ in each context and needs further consideration. Some initial ideas are highlighted here:

In August 2016, the legislation for the OMP was enacted by Parliament paving the way for the establishment of the first permanent office to investigate enforced disappearances and missing persons. In the case of the OMP, the victims in question are the families of the missing and disappeared, as well as the missing and disappeared persons themselves.⁶ The OMP provides for a broad category of persons to come before it and make a complaint. There is also provision for victims and civil society to be engaged with the OMP, a point pushed by civil society. Despite the passage of several months since the legislation was enacted, the OMP is yet to be established. It is important that the Government does not further delay the appointment of the OMP and that the necessary resources are made available for it to fully function. Similarly, it is paramount that the OMP introduce rules that enable victims to actively participate in proceedings and the OMP address critical issues such as protection within its work.

The TRC’s mandate can be broader⁷; the term victim can encompass all individuals harmed by the war who wish to tell their story and find the truth. Most commissions appointed by successive governments in Sri Lanka had a specific focus such as disappearances⁸ with the exception being the LLRC⁹ and a few others such as the Udalagama Commission.¹⁰ TRCs from other countries have witnessed large numbers engaging with the process to find the truth of missing loved ones.¹¹ For example, in Argentina the CONADEP was the first time an independent entity investigated the disappearances of thousands of Argentinians during the military dictatorship.¹² In South Africa, many victims came before the South African TRC to find the truth and for acknowledgement of past abuses.¹³ This was also the first time

⁶ CPA has elsewhere called for a forensics unit within the OMP whose investigative methods put families at the center of the process. See CPA, *Office on Missing Persons: Outstanding Issues for Consideration to Strengthen Legislation and Post-Enactment Implementation*, Colombo: CPA, July 2016, <http://www.cpalanka.org/wp-content/uploads/2016/08/FINAL-OMP-NOTE-JULY-2016-.pdf>; CPA, *Submission to the Consultation Task Force on Reconciliation Mechanisms by the Centre for Policy Alternatives (CPA)*, Colombo: CPA, August 2016, <http://www.cpalanka.org/wp-content/uploads/2016/08/FINAL-Submission-to-the-CTF-August-2016.pdf>.

⁷ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, New York: Routledge, 2010.

⁸ Kishali Pinto-Jayawardhena, *Post War Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry*. International Commission of Jurists 2010; CPA, *A List of Commissions of Inquiry and Committees Appointed by the Government of Sri Lanka (2006–2012)*.

⁹ Lessons Learnt and Reconciliation Commission, 2011. For more information on past commissions, refer to CPA, *A List of Commissions of Inquiry and Committees Appointed by the Government of Sri Lanka (2006–2012)*.

¹⁰ Amnesty International, *Twenty Years of Make Believe: Sri Lanka’s Commissions of Inquiry*, 2009.

¹¹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, New York: Routledge, 2010.

¹² Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W.W.Norton & Company Inc., 2011.

¹³ Hayner.

proceedings of a TRC were telecast live, enabling the public to see, hear and learn of past abuses. In most of these instances, TRCs have been a tool to recognise past abuses and to lift the veil of denial.

In the context of the court, the term victim has two distinct meanings. The court should serve victims of the war in general, not all of whom are eligible for legal standing before the mechanism, as well as victims of the specific crimes being investigated and prosecuted by the court, who may be eligible for standing. These points are further discussed below, but it is essential to explore options where victims are able to participate in court proceedings.

Finally, the office of reparations can provide individual reparations to specific persons and collective reparations to communities, so the term victim has multiple meanings in this context.¹⁴ Reparations are critical as a means to acknowledge past abuses and to take steps to address the past.¹⁵ They can be either material or symbolic. In some instances, reparation efforts may be the first time a government has had direct contact with victims and thus must be treated carefully. Reparations should not be perceived as paying off victims or buying their silence but as part of a comprehensive process to address past abuses. There must be careful consideration to ensure victims are not further marginalized, and issues of equity must be addressed.

Each of the above mechanisms should have its own victim/witness protection unit, which will require a more technical definition of the term victim to determine who receives protection. Finally, specific subcategories of victims require special attention, including women, children, and the disabled.

5. All four mechanisms, even those which employ narrower definitions of victimhood, need to remain attuned to the process by which people became victims in the first place. As Juan Méndez, former UN Special Rapporteur on Torture, has stated, “It is essential to recognize that the perpetrators’ selection of targets is frequently related to deeper injustices and marginalization in society.”¹⁶ Transitional justice mechanisms therefore “must consider [victims’] original status in society, including their membership in communities subjected to ancestral discrimination.”¹⁷ To achieve the goal of non-recurrence, transitional justice must address ongoing threats and violence against communities that were targeted during the war, as well as their social and economic marginalization.¹⁸ Such responses can include much-needed reforms to address structural violence and discrimination. In Sri Lanka, the ongoing constitutional reform process is a starting point to address root causes of violence and ensure all citizens are treated equally

¹⁴ Bhavani Fonseka, *The Need for a Comprehensive Reparations Policy*, Colombo: CPA, April 2015, <http://www.cpalanka.org/wp-content/uploads/2015/04/The-Need-for-a-Comprehensive-Reparations-Policy-and-Package2.pdf>.

¹⁵ Pablo de Greiff, ed. *The Handbook of Reparations*, Oxford, U.K.: Oxford University Press, 2006.

¹⁶ Juan E. Méndez, “Victims as Protagonists in Transitional Justice,” *International Journal of Transitional Justice* 10(1) (2016): 1-5.

¹⁷ Méndez.

¹⁸ Lisa J. Laplante, “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2(3) (2008): 331-355; José Pablo Baraybar (Forthcoming).

with structures and processes in place to prevent discrimination and institute safeguards against it. In addition, legal and policy reforms should be undertaken to prevent the targeting of specific communities coupled with awareness raising and steps to mitigate any future marginalization and violence.

II. The Definition of Victim within the Transitional Justice Realm

The international legal framework for victimhood comes from two UN General Assembly resolutions, the first passed in 1985, which defined victims as:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.¹⁹

The resolution stated that victims could also include “the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”²⁰ In 2005, the UN General Assembly applied the same definition to the victims of international crimes, the only difference being that the acts or omissions in question would “constitute gross violations of international human rights law, or serious violations of international humanitarian law.”²¹ Juan Méndez notes that “the experience of suffering is not limited to that of persons who are directly targeted for murder, arbitrary arrest, forced disappearance or torture. Their next of kin and even members of the community to which the direct victims belong also suffer in various ways.”²² Similar positions have been taken by other organizations, and there is now a broad definition as to who is regarded as a victim.²³

The notion of victim-centered transitional justice has emerged alongside international frameworks for victims’ rights like the aforementioned General Assembly resolutions. In 2010, the United Nations published its Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice, which included among its guiding principles “[t]o ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms.”²⁴ The note stated:

The UN must respect and advocate for the interests and inclusion of victims where transitional processes are under consideration...Placing victims at the centre of this work also requires ensuring that victim’s rights and views are fully respected in the

¹⁹ United Nations General Assembly (UNGA), “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,” A/RES/40/34, 29 November 1985.

²⁰ UNGA, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,” A/RES/40/34.

²¹ UNGA, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” A/RES/60/147, 21 March 2006.

²² Méndez.

²³ Impunity Watch, for example, adopted a similar definition in a 2014 paper on victim participation: the term ‘victim’ will be used to refer to natural persons who are the surviving direct victims of serious crimes under international law (war crimes, crimes against humanity, genocide) and/or gross human rights violations (e.g. torture, forced disappearances), as well as their family members, irrespective of identity or their potential multiple roles as both victim and perpetrator. Impunity Watch.

²⁴ United Nations Secretary-General, “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice,” March 2010, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

implementation of transitional justice processes, including, as appropriate, through the use of victim-sensitive procedures that guarantee victims' safety and dignity, and the development of specific capacities to assist, support and protect victims and witnesses.²⁵

The following year, the UN Human Rights Council highlighted the importance of victim-centrism when it created the position of Special Rapporteur on the Promotion of Truth, Justice, Reparation and guarantees of Non-Recurrence.²⁶ It is worth noting that gender-sensitivity, though included as a separate component of the Special Rapporteur's mandate, should be part of any victim-centered approach as well.²⁷ Special Rapporteur Pablo de Greiff elaborated on this approach in his first annual report in 2012, calling for the "meaningful participation" of victims, victims' organizations, and civil society in truth-seeking, prosecutions, reparations, and legislative reforms.²⁸ In 2012, the UN Human Rights Council affirmed the importance of a "victim-centred approach" in all transitional justice activities.²⁹

Juan Méndez argues that victims have long played a critical role in transitional justice processes: "Victims and survivors were, of course, present and active at the outset of this remarkable movement," he writes. They "became prominent protagonists" and thus today must participate "in the design and execution of all programs."³⁰ Victim participation is "a well-established norm," and a "measuring stick" for the effectiveness and success of transitional justice programs.³¹

²⁵ United Nations Secretary-General.

²⁶ Resolution 18/7 called on the Rapporteur "To integrate a victim-centred approach throughout the work of the mandate." United Nations Human Rights Council, "Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," A/HRC/18/L.22, 26 September 2011.

²⁷ UN Human Rights Council, "Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," A/HRC/18/L.22.

²⁸ Pablo de Greiff, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/21/46, New York: United Nations, 9 August 2012.

²⁹ UN Human Rights Council, "Human rights and transitional justice," A/HRC/RES/21/15, 11 Oct. 2012.

³⁰ Méndez.

³¹ Méndez.

III. Standing

When considering the role of victims in criminal trials, a number of questions arise regarding representation, participation, and inclusion. Who has the authority to speak for victims? Who sets the agenda? Who has a voice in decision-making processes? How are the multiplicity of voices and perspectives taken into account? Part of guaranteeing victims' rights also means ensuring due process for the perpetrator so that trial has legitimacy and can go forward.

Pablo de Greiff says, "Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings".³² Juan Méndez agrees with this position, stating that "[i]n both domestic and international trials, the direct and indirect victims of the crime being prosecuted should be heard, not only as witnesses but also in making legal arguments, offering evidence and more generally moving the process forward".³³ Méndez observes that in the absence of opportunities for direct participation, victims' groups and civil society will organize mobilizations and demonstrations at the courthouse that can "disrupt court hearings". For that reason, victims should be able to participate directly as civil parties.³⁴ Mariana Pena and Gaelle Carayon provide another reason to provide standing to victims, noting that "participation in the justice process could bring recognition to victims and be an important factor in their healing and rehabilitation".³⁵

Several domestic civil jurisdictions, including Argentina, Peru, and Uruguay, give victims the opportunity to participate in the judicial process.³⁶ Likewise, two international war crimes tribunals, the International Criminal Court (ICC) and the Extraordinary Chambers in the Court of Cambodia (ECCC) have robust procedures in place. The statute for the Extraordinary African Chambers in the Courts of Senegal, which was established in 2013 to try former Chadian president Hissène Habré for human rights violations, provides for victim participation at all stages in the proceedings.³⁷ As of 2014, over 1,000 victims had applied to join the proceedings, with the assistance of local NGOs and victims' groups.³⁸ The following section will look further at the experiences of the ICC and ECCC and lessons for Sri Lanka.

³² Pablo de Greiff, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/21/46.

³³ Méndez.

³⁴ Méndez.

³⁵ Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?" *International Journal of Transitional Justice* 7(3) (2013): 518-535.

³⁶ Katya Salazar and Maria Clara Galvis, "Reflections on the role of the victim during transitional justice processes in Latin America," *Politorbis* 50(3) (2010): 111-121.

³⁷ Thorsten Bonacker (2010), "Victim Participation in Transitional Justice Processes: Global Norms, Transnational Advocacy and Local Activism," Annual Meeting of the International Studies Association, February 2010, New Orleans, LA; Impunity Watch.

³⁸ REDRESS, *A Victim-Centred Prosecutorial Strategy to Respect Victims' Rights and Enhance Prosecutions*, London, U.K.: REDRESS, July 2014, <http://www.redress.org/downloads/publications/a-victim-centred-prosecutorial-strategy.pdf>.

ICC

The ICC infrastructure allows for several modes of victim participation, including through Article 68(3) of the Rome Statute and in Rules 89 and 91.15. Rule 50(1) gives victims the right to be informed when the Prosecutor seeks to initiate an investigation through her *proprio motu* powers. Rule 16 gives victims the right to “submit observations during a challenge to admissibility or jurisdiction of a case.”³⁹ Victim participation policies have changed over time, as different trial chambers have experimented with different forms.⁴⁰ As a result of a series of trial chambers decisions, victim participation now involves:

making opening and closing statements; consulting the record of proceedings; receiving notification of all public filings and those confidential filings that affect their personal interest; tendering and examining evidence if the Chamber feels it will assist in determining the truth (i.e. not a right to present evidence, but to seek leave for its submission); and finally, the legal representative of victims can attend and participate in proceedings, as well as question witnesses, experts and the accused, subject to certain controls.⁴¹

An early decision denied the right of victims to participate during the investigative stage as there were concerns that this right would intrude on the investigative process.⁴² One alternative proposal involved “making information about the ICC available to victims and encouraging them to communicate with the Court, notifying the broadest category of potential victims about specific rights available to them [...] and making clear to victims how they might meaningfully participate”.⁴³

At the outset of each case, the court takes five steps before initiating the victim participation process.⁴⁴ First, the court staff map potential victim populations and civil society organizations that can serve as partners. Second, the court recruits and trains local civil society partners to act as volunteer intermediaries. Third, the intermediaries conduct outreach to victims to spread awareness of the court and victim participation opportunities. Fourth, a combination of ICC field staff, unpaid intermediaries, and legal representatives help victims submit applications. Fifth, victims’ applications are evaluated, and if approved, assigned legal counsel.⁴⁵

For the purposes of participation, victims must be “persons who have suffered directly or indirectly from the charges against the accused” rather than simply “persons who have suffered from any crime within the jurisdiction of the Court”.⁴⁶ Each victim application is

³⁹ Impunity Watch.

⁴⁰ Impunity Watch.

⁴¹ Impunity Watch.

⁴² Impunity Watch.

⁴³ Impunity Watch.

⁴⁴ Human Rights Center, University of California, Berkeley, School of Law, *The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court*, Berkeley, CA: Human Rights Center, 2015, https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf.

⁴⁵ Human Rights Center, University of California, Berkeley, School of Law.

⁴⁶ Human Rights Center, University of California, Berkeley, School of Law.

evaluated on a case-by-case basis.⁴⁷ The Registry has to process a high volume of applications, which can strain the efficiency of proceedings.⁴⁸ Each application is entered into a database, shared with judges, redacted, and shared with legal counsel. If information is missing or seems incorrect, court staff must check back with applicants. This process can take months. Once the Registry has processed the applications, judges determine “whether or not the applicant has sufficiently demonstrated his or her direct link to the specific crimes articulated in the indictment”.⁴⁹

In the *Lubanga* trial⁵⁰, 129 victims were initially granted participation. In the second case, the Court managed the volume of applicants by dividing victims into two groups, each of which had a common legal representative. In the *Bemba* case⁵¹, there were 5,000 victims, who again were divided into two groups. The *Gbagbo* case⁵² inaugurated a collective application process. Later Kenya decisions established two pathways for participation, one involving direct individual participation and the second involving indirection participation with common legal representation. Only victims who wished to appear directly had to submit application forms. The dangers of the collective approach, Impunity Watch observes, is that it “assumes not only levels of homogeneity in victimisation, but also in the interests of victims when seeking participation”.⁵³

There have been several benefits to victim participation at the ICC. In the *Bemba* case, victims’ lawyers resolved an unsettled question as to which local languages were spoken in the Central African Republic. In *Lubanga*, victims resolved a question about witness identity by explaining Congolese habits around name attribution and composition. In *Ruto & Sang* and *Kenyatta*⁵⁴, victims’ representatives made filings that helped the Chamber’s ruling on matters including “the date for opening of the trials, the possibility of holding parts of the trial in situ and the presence or absence of the accused during the proceedings”.⁵⁵

ECCC

Rule 23 of the ECCC’s Internal Rules gives victims the right to serve as civil parties with similar procedural rights to the defence and prosecution.⁵⁶ Victims are able to participate directly in the investigation and court proceedings.⁵⁷ Victims can apply to participate or serve as civil parties by submitting victim participation forms.⁵⁸ They “must demonstrate

⁴⁷ Impunity Watch

⁴⁸ Impunity Watch.

⁴⁹ Human Rights Center, University of California, Berkeley, School of Law.

⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

⁵¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

⁵² *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15.

⁵³ Impunity Watch.

⁵⁴ International Federation for Human Rights (FIDH), *Five Myths About Victim Participation in ICC Proceedings*, Paris, France: FIDH, 2014, <https://www.fidh.org/IMG/pdf/cpi649a.pdf>.

⁵⁵ FIDH.

⁵⁶ Impunity Watch.

⁵⁷ Bonacker (2010).

⁵⁸ Bonacker (2010).

that they are a direct victim of a crime committed by the Khmer Rouge between April 1975 and January 1979, suffering physical, psychological, or material harm”.⁵⁹ The defence has argued that the participation of civil party lawyers disadvantages the defendant.⁶⁰

Initially civil parties could participate as equal parties, but judges eventually limited the ability of individual victims to speak in court and choose their own lawyers.⁶¹ Judges have stated that the civil party interventions—at nearly 4,000 victims— were overwhelming the process, as was lawyers’ inability to coordinate.⁶² As a result, judges developed a system for consolidating civil parties into a single group, represented by two lead lawyers, and victims’ individual lawyers unable to address the court.

Some victims themselves have objected to the nature of their participation, calling the process “disempowering”.⁶³ After extensive interviews with victims, Mahdev Mohan found that the ECCC process “regards victims as having a collective story, a unitary, bounded and unchanging narrative of trauma that reduces and incorporates all that is essential into the ‘story of the victim’”.⁶⁴ The process, he concludes, has “begun to ignore or conflate the victims’ varied personal identities, memories, and desires for vindication”.⁶⁵

There have also been documented benefits, however, to civil party participation. For example, as a result of civil party intervention in one investigation, the court brought charges of forced marriage for the first time.⁶⁶ It also seems likely that the final verdict in one case, which changed a 35-year sentence to life imprisonment, “was adopted to honour victims’ expectations of a harsh punishment, following reports of extensive dissatisfaction in Cambodia and in diaspora communities abroad”.⁶⁷

In Sri Lanka, there have been instances where lawyers represented victims before judicial proceedings, investigations and inquiries. For example, lawyers and several civil society organisations including CPA obtained standing at the Udalgama Commission to represent the interests of the victims. In the Vishvamadu case, lawyers represented the victim during the court proceedings.⁶⁸ Similar examples are cited in other cases such as the recently concluded Kumaraperuma trial and the High Court trial on the assassination of former TNA politician Nadarajah Raviraj. Despite these efforts, there is no uniformity and many victims do not have lawyers or civil society support. In the context of international practices and proposed mechanisms, it is critical that greater attention be given to the modalities of victim participation and standing in future trials including in the proposed special court.

⁵⁹ Impunity Watch.

⁶⁰ Impunity Watch.

⁶¹ Julie Bernath, “Complex Political Victims’ in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia,” *International Journal of Transitional Justice* 10(1) (2016): 46-66.

⁶² Impunity Watch.

⁶³ Impunity Watch.

⁶⁴ Mahdev Mohan, “The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal,” *International Criminal Law Review* 9 (2009): 1-43.

⁶⁵ Mohan.

⁶⁶ REDRESS.

⁶⁷ Bernath.

⁶⁸ Women’s Action Network (WAN), “WAN Statement on the Vishvamadu Rape Case,” 7 October 2015.

Legislative reforms must provide for participation and standing but also remain cognizant of the challenges faced in other contexts. Furthermore, planning will be required prior to the commencement of a trial to ensure there are sufficient resources and expertise to ensure full and sustained participation throughout the course of the trial, and avoid a tokenistic approach.

IV. Protection

As Priya Gopalan has stated, “Safety and security of victims and witnesses form the bedrock of any effective judicial process”.⁶⁹ Protection involves both physical security and psychosocial support. Victims must be assured of their safety, and the process should not re-traumatize them. In February 2015, the Sri Lankan Parliament passed the Assistance to and Protection of Victims of Crime and Witnesses Act. While this law makes some progress for victims’ rights in Sri Lanka, further reforms are urgently needed including independence of the mechanisms and the necessary expertise and skills for staff.⁷⁰ This section will first examine how the law can be improved and then evaluate models for implementation from the victim/witness units of the ICC and the Special Court for Sierra Leone (SCSL).

In September 2015, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released its report on the OHCHR Investigation on Sri Lanka (OISL), which provided a number of recommendations in regard to the 2015 witness protection law.⁷¹ These recommendations included clearly defining criteria for protection eligibility, guaranteeing the independence of both the National Authority and Division for witness protection, allowing audio-visual testimony from abroad, ensuring extensive financial and human resources for implementation, and establishing special mechanisms to protect children and victims of sexual violence.⁷²

The Institute for Security Studies has identified five elements that determine effectiveness of witness protection programs:

1. The financial, security and political parameters, within which a protection programme functions.
2. The structure and independence of the protection mechanism.
3. The extent to which a programme is able to procure cooperation from state and non-state institutions locally and internationally.
4. The efficacy and efficiency of the justice system or institution as a whole.
5. The nature and scale of the threat to witnesses.⁷³

Other important considerations include “psychosocial care for staff and witnesses” and the “establishment of a fund for victims of witness recidivism or other protected witness who have been harmed”.⁷⁴

⁶⁹ Priya Gopalan, “The Long Journey to Justice for Sri Lanka’s Victims (Part II),” *IntLawGrrls*, 28 Oct. 2015, <https://ilg2.org/2015/10/28/the-long-journey-to-justice-for-sri-lankas-victims-part-ii>.

⁷⁰ See also Aruni Jayakody, *Victim & Witness Protection: The Need for Further Reform*, Colombo: South Asian Centre for Legal Studies (SACLS), 2015,

http://sacsls.org/images/publications/reports/VICTIM_AND_WITNESS_PROTECTION-THE_NEED_FOR_FURTHER_REFORM.pdf; Gopalan; BASL, *Understanding The Law: Assistance to and Protection of Victims of Crime and Witnesses Act, No 4 of 2015*, 2016.

⁷¹ OHCHR, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, A/HRC/30/CRP.2.

⁷² OHCHR, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, A/HRC/30/CRP.2.

⁷³ Institute for Security Studies (ISS), *The Justice Sector Afterthought: Witness Protection in Africa*, Tshwane (Pretoria), South Africa: ISS, 6 May 2010, <https://oldsite.issafrica.org/uploads/Book2010WitnessProt.pdf>.

⁷⁴ ISS.

ICC

The ICC's Victims and Witnesses Unit (VWU) has had enormous success protecting the lives of all who fall under its auspices. The VWU, established by Article 43(6) of the Rome Statute, operates under the office of the registrar.⁷⁵ Although the definition of victims for whom the unit was responsible was initially narrow, an ICC Trial Chamber early on expanded the definition to include all victims who had submitted an application to participate in the proceedings. The VWU provides protection, security, counselling, and other assistance to "victims who appear before the court" and "others who are at risk on account of testimony by such witnesses".⁷⁶ The ICC also protects intermediaries and informants in indirect ways, through careful investigate procedures and redaction of sensitive information in court filings. The VWU includes staff who specialize in trauma, including trauma related to sexual violence.⁷⁷ The VWU's budget comes from the regular court budget, which means funding is guaranteed, although it can be supplemented by voluntary contributions from external sources. The budget covers "staffing, travel, protective measures, consultation with other court organs and assistance". To evaluate initial risk to witnesses, the ICC sends in "flying teams" prior to the start of investigations, which evaluate how the investigation will affect witnesses and collects information as to how suspects might threaten witnesses. The prosecution responds to these concerns with a mitigation strategy, which only leads to an investigation if the strategy is found to be sufficient.⁷⁸

SCSL

The Witnesses and Victims Section (WVS) of the SCSL, was established by Article 16(4) of the court's statute.⁷⁹ As in the case of the ICC, the WVS has experienced success protecting the security of all in its purview. The WVS has interpreted its mandate to include "protection physically, psychologically and financially".⁸⁰ Rule 34(A) of the court's Rules of Procedure and Evidence requires that the WVS "provide physical protection and ensure relevant counselling, psychological, medical and physical assistance for witnesses" and require its staff to include "experts in trauma" and work with civil society organizations on psychosocial issues as needed.⁸¹ The WVS must ensure that witnesses receive "relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children".⁸² Witness' privacy is addressed by Rules 69 and 75, which

⁷⁵ ISS.

⁷⁶ ISS.

⁷⁷ ISS.

⁷⁸ ISS.

⁷⁹ ISS.

⁸⁰ ISS.

⁸¹ ISS.

⁸² Rebecca Horn, Simon Charters, and Saleem Vahidy, "Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone," *International Journal of Transitional Justice* 3(1) (2009): 135-149.

balances measures for privacy against defendants' rights. The SCSL's funding comes from voluntary gifts from UN member states.⁸³

The WVS has two units, one focusing on protection, security and movement, which include about 30 staff members, and the other focusing on psychosocial support, which include around 10 staff members, who include counsellors, two medical experts, and a psychologist.⁸⁴ If lawyers determine a witness faces a high security threat, they alert the WVS, which may place the individual in "total protective care," which involves providing a safe house until testimony is given and possible relocation following testimony. While witnesses are under the care of the court, they receive secure housing accommodations, food, toiletries, a financial allowance to compensate for lost wages, an initial medical assessment, and care for all medical needs. There are psychosocial support officers available 24 hours a day.

Considering the importance of protection, the Government of Sri Lanka must take immediate steps to reform the existing victim and witness protection framework and address practical issues. A fundamental point here is to ensure the structures involved in protection are independent and impartial. The Authority and Division provided in the legislation require considerable reforms as they are presently closely linked to state apparatuses that are perceived by victims and affected communities as perpetrators of violence or complicit in particular cases. There must also be a robust role for nongovernmental actors including civil society and service providers within any future mechanisms mandated with protection. As noted by CPA previously, there were instances where victims and witnesses who engaged with state investigations and other initiatives were threatened and intimidated.⁸⁵ Most recently the Consultation Task Force on Reconciliation Mechanisms (CTF) noted incidents of surveillance and intimidation of those who came before its sittings.⁸⁶ Such events demonstrate ongoing efforts by certain actors including intelligence operatives to harass victims searching for loved ones and to undermine any independent efforts at unearthing the truth and providing justice. The onus is now on the Government to take immediate steps to reform the existing framework and to instil a zero tolerance policy of victim and witness intimidation and harassment.

In terms of the mechanisms, CPA has previously recommended the establishment of specific units/teams with the mandate to protect victims and witnesses within each of the mechanisms.⁸⁷ This is consistent with the recommendations of the CTF in its final report, released in January 2017.⁸⁸ CPA welcomes the inclusion of such a unit in the OMP and urges the authorities to include separate entities in the TRC, special court and special counsel's office and the Office for Reparations. Such units/teams should have experienced and trained staff to address the different issues involving protection. Language skills are also needed as well as staff who have no political or other links that may result in security

⁸³ ISS.

⁸⁴ Horn, Charters, and Vahidy.

⁸⁵ CPA, *A Commentary On the Presidential Commission to Investigate Missing Persons*, 2015

⁸⁶ CTF, *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Volume I.

⁸⁷ CPA, *Transitional Justice in Sri Lanka and Ways Forward*, 2015

⁸⁸ CTF *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Volume I.

problems. In the consideration of past violations, there must also be attention towards cultural and religious norm and a gendered focus.

V. Non-Recurrence and Social Transformation

For transitional justice to be truly victim-centered, it must address the process by which people became victims. How was it that these people in particular became marginalized or vulnerable? Why were they targeted? Non-recurrence of violations depends on an effective security-sector reform process, but it does not end there. As Kris Brown and Fionnuala Ní Aoláin observe, the term “victim-centered” associates transitional justice with, among other aims, “rebalancing power relations”.⁸⁹ Juan Méndez, too, has recognized the importance of a shift in power, noting that “victims of international crimes are almost always first denied ‘citizenship’ in the true sense of the word, and then victimized”. Transitional justice must hold as a goal “[t]heir vindication as first-class citizens”.⁹⁰ Tazreena Sajjad states that “a victim-centered approach would challenge the existing relations of caste, gender and ethnicity” and “engender a socially transformative process”.⁹¹ Therefore, “addressing the needs of war victims is inextricably tied to the question of how to effectively address systemic marginalization of communities”.⁹²

Former High Commissioner for Human Rights, Louise Arbour argues that transitional justice “must reach to-but also beyond-the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that predated the conflict and caused or contributed to it”.⁹³ In the context of these more expansive aims, the definition of human rights violations encompasses “a great number of discriminatory practices and violations of economic, social, and cultural rights”.⁹⁴ An ICC case manager for Kenya raises a similar point: “Is the participation of victims in the process meaningful if their dignity is not first restored and their social and economic rights upheld? Indeed, how will victims be able to participate in a meaningful manner if they continue to eke out a meagre existence almost five years after the violence ended?”⁹⁵

Likewise, Lisa Laplante highlights the importance of “redress for historical inequality and violations of economic, social and cultural rights that often pre-date, run concurrently with and follow episodes of political violence”. She posits that “even with trials and reparations, if economic and social inequalities go unaddressed and the grievances of the poor and marginalized go unheard, we are left with only uncertain guarantees of nonrepetition. It is like treating the symptoms while leaving the underlying illness to fester”.⁹⁶ Arbour similarly states that a focus on economic and social rights is key to conflict prevention. Transitional justice, she writes, must “attack the sources of the legitimate grievances that, if

⁸⁹ Kris Brown and Fionnuala Ní Aoláin, “Through the Looking Glass: Transitional Justice Futures through the Lens of Nationalism, Feminism and Transformative Change,” *International Journal of Transitional Justice* 9(1) (2015): 127-149.

⁹⁰ Méndez.

⁹¹ Tazreena Sajjad, “Heavy Hands, Helping Hands, Holding Hands: The Politics of Exclusion in Victims’ Networks in Nepal,” *International Journal of Transitional Justice* 10(1) (2016): 25-45.

⁹² Sajjad.

⁹³ Louise Arbour, “Economic and Social Justice for Societies in Transition,” *New York University Journal of International Law and Politics* 40 (2008):1-27.

⁹⁴ Arbour.

⁹⁵ Impunity Watch.

⁹⁶ Laplante.

unaddressed, are likely to fuel the next conflagration”.⁹⁷ Dustin Sharp argues that “poverty and economic violence can be associated with the onset of conflict, exacerbated by conflict, and continue afterwards as a legacy of conflict” and necessitate “a better balance between a range of justice concerns in transition”.⁹⁸

In places as varied as Northern Ireland and Guatemala, “systematic discrimination and inequality in access to resources, land, work, and housing have led to conflict or exacerbated the social tensions behind it”.⁹⁹ Lisa Laplante and Kimberly Theidon note that the Peruvian TRC concluded that “regional and ethnocultural inequalities were crucial to the conflict’s development” and that “the socioeconomic and cultural divide between Peru’s coastal capital of Lima and...rural areas constituted determinant factors in the conflict’s intensity, as well as the resulting social, psychological and economic damage experienced by the population”.¹⁰⁰ In Nepal, Tazreena Sajjad observes, “the landscape of war victims mirrors the same communities that have historically been victimized by the systemic practices of caste, sociopolitical hegemony and gender-based discrimination”.¹⁰¹

In his March 2010 “Guidance Note on the United Nations Approach to Transitional Justice”, the UN Secretary-General called on the UN to “strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights”.¹⁰² Similarly, OHCHR has identified both the failure to realize economic, social, and cultural rights and violations of these rights as among the root causes of conflict. OHCHR has also noted that, “actions and omissions by States and non-State actors during conflict can also amount to violations of economic, social and cultural rights, and often have a particular impact on the most vulnerable”.¹⁰³ This section will examine how various forms of transitional justice mechanisms can address these aspects of human rights.

Within Sri Lanka’s context, both state initiatives and civil society have documented past and ongoing discrimination and marginalization.¹⁰⁴ Most recently, the CTF also touched on these issues.¹⁰⁵ Within the present reform agenda, these issues must continue to receive attention. CPA has previously highlighted the need to address marginalization of specific communities such as the Upcountry Tamils and those directly affected by the war, land and

⁹⁷ Arbour.

⁹⁸ Dustin Sharp, “Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice,” *Fordham International Law Journal* 35 (2012): 780-814.

⁹⁹ Arbour.

¹⁰⁰ Lisa J. Laplante and Kimberly Theidon, “Claiming Citizenship: Collective Reparations in Post-TRC Peru,” *Anthropology News* (Jan. 2008): 36.

¹⁰¹ Sajjad.

¹⁰² Office of the United Nations High Commissioner for Human Rights (OHCHR), *Transitional Justice and Economic, Social and Cultural Rights*, Geneva, Switzerland: United Nations, Jan. 2014, <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>.

¹⁰³ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*.

¹⁰⁴ Lessons Learnt and Reconciliation Commission, 2011; See Bhavani Fonseka, Luwies Ganesathasan & Shalomi Daniel, *Two Years in Government: A Review of the Pledges Made in 2015 Through the Lens of Constitutional Reform, Governance and Transitional Justice*, CPA, February 2017.

¹⁰⁵ CTF *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Volume I.

displacement, language rights and other issues.¹⁰⁶ The present government's efforts such as the return of lands, provision of livelihood support, and singing the national anthem in both languages only go so far and much more is required. The proposed constitutional reforms are a start, but practical steps are also needed such as the enforcement of legislation, provision of resources, awareness-raising, and trainings. While this document is not examining the specifics, CPA urges the authorities to take immediate steps to address the gaps in many areas highlighted over the years as well as initiate reforms to address continuing discrimination and marginalization. Some issues are examined below in terms of proposed mechanisms:

Truth Commissions

Truth Commissions can investigate issues of marginalization and discrimination and make recommendations for remedy and prevention.¹⁰⁷ Lisa Laplante argues that expanding TRC mandates in this fashion “would allow TCs to treat the root causes of political violence as more than just ‘historical context’ for the study of civil and political violations, framing them in terms of state obligations that were not fulfilled and thus require redress.”¹⁰⁸ In Timor-Leste, the truth commission allocated a chapter of its final report to violations of economic and social rights. The report stated that “the impact of the conditions in which the people of East Timor lived, while often less remarked on, was equally damaging and possibly more long lasting” than were civil and political rights violations.¹⁰⁹ Truth commissions in Sierra Leone, Guatemala, and Liberia have also considered economic and social rights violations.¹¹⁰

Ministers and officials have indicated that the framework for the proposed TRC will be unveiled in early 2017. The drafters of the TRC framework must take note of Sri Lanka's history and particular issues that exacerbated ethnic and religious tensions, discrimination, and marginalization as well as ongoing issues but also be cognizant of not overwhelming a future TRC with too broad a mandate. Thus, it is important to note the work of TRCs in comparative contexts but also identify a mandate that is most suited for Sri Lanka's own history and challenges, considering also that other mechanisms and processes can be established to address particular grievances.

Reparations

Reparations programs can also address economic, social, and cultural rights. In South Africa, Guatemala, and Bosnia and Herzegovina, reparations included housing and property restitution programs; the first two countries also offered land reform programs. Truth commissions in South Africa, Chile, Peru, and Morocco, issued recommendations on

¹⁰⁶ See Fonseka, Ganeshathasan & Daniel, *Two Years in Government: A Review of the Pledges Made in 2015 Through the Lens of Constitutional Reform, Governance and Transitional Justice*, CPA, February 2017. For more information, refer to www.cpalanka.org and www.tjsrilanka.org.

¹⁰⁷ Arbour.

¹⁰⁸ Laplante.

¹⁰⁹ Arbour.

¹¹⁰ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*.

reparations related to health care, which included mental health.¹¹¹ Guatemalan and Peruvian truth commissions made recommendations for education reforms “to redress the loss of educational opportunities caused by the conflict and improve access to and adequacy of education for indigenous peoples.”¹¹² Both Nepal and South Africa implemented institutional reforms that dealt with “root causes and violations of economic, social and cultural rights”. Other countries that took such measures include Argentina and Sierra Leone.¹¹³

Louise Arbour cautions, however, that “individual reparations and collective reparations to individual victims will never substitute for more broad-based and longer term socio-economic policies that aim to redress and prevent widespread inequalities and discrimination”. Arbour urges transitional justice mechanisms to recommend “the adoption of such measures as part of the necessary reparation for victims and of a comprehensive strategy of national reconciliation and peace.” Transitional justice, she writes, should include “social justice and the guarantee of substantive equality in the enjoyment of all rights”.¹¹⁴

Reports indicate that the proposed Office focusing on reparations could be established in early 2017. CPA reiterates its call for a comprehensive reparations policy and package and in doing so highlights the importance of legislative and policy reforms when introducing a future mechanism.¹¹⁵ It is also critical to examine modalities that address the Sri Lankan context and have a combination of individual, collective, material and symbolic reparations.¹¹⁶

Judicial Mechanisms

Judicial mechanisms can address violations of economic, social, and cultural rights that are violations of international humanitarian law, such as the systematic destruction of homes, forced displacement, and starvation caused by restrictions of aid delivery or the destruction of food crops.¹¹⁷ CPA has previously examined some of these issues and reiterates the call for the special court and special counsel’s office to be established without further delay and for legal reforms such as the incorporation of international crimes into domestic legislation.¹¹⁸

¹¹¹ Arbour.

¹¹² Arbour.

¹¹³ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*.

¹¹⁴ Arbour.

¹¹⁵ Fonseka, *The Need for a Comprehensive Reparations Policy*, Colombo: CPA, April 2015.

¹¹⁶ Fonseka, *The Need for a Comprehensive Reparations Policy*, Colombo: CPA, April 2015.

¹¹⁷ Arbour.

¹¹⁸ CPA, *Submission to the Consultation Task Force on Reconciliation Mechanisms by the Centre for Policy Alternatives (CPA)*.

Broader Reforms

Sri Lanka is presently in the process of constitutional and legal reform, which should have the overarching focus of addressing discrimination and marginalization with the aim of social transformation. For example, the reform of the Bill of Rights has prompted robust debate on the justiciability of economic, social and cultural rights.¹¹⁹ There are also other reforms proposed to address discrimination including in the areas of land, language and gender. It is to be seen whether there will be any tangible changes. Apart from constitutional and legal reforms, there must also be implementation of laws and policies, awareness raising, capacity building and a host of other changes.¹²⁰ Thus, a range of action is required if social transformation is to have an impact.

¹¹⁹ See Fonseka, Ganeshathasan & Daniel, *Two Years in Government: A Review of the Pledges Made in 2015 Through the Lens of Constitutional Reform, Governance and Transitional Justice*, CPA, February 2017

¹²⁰ See Fonseka, Ganeshathasan & Daniel, *Two Years in Government: A Review of the Pledges Made in 2015 Through the Lens of Constitutional Reform, Governance and Transitional Justice*, CPA, February 2017.

Conclusion and Recommendations

This report has focused on specific aspects of victim-centered transitional justice; standing, protection, and broader recognition of discrimination and marginalization and related action. CPA has previously published work on the OMP and restates the centrality of victims in the process.¹²¹ Similarly, victims must be central in other mechanisms and processes addressing truth, justice, reparations and non-recurrence. That said, CPA makes the following recommendations to guide future legislative, policy and administrative reforms:

General Recommendations

- There must be consideration of how to **define victimhood**. An open timeframe should be recognised to define what falls within the term victimhood in the Sri Lankan context. This should also address the full range of crimes people experienced during the war. Furthermore, channels should be open to all victim communities to ensure transparency and inclusivity with steps taken to avoid excluding anyone.
- Ensure that victims have a **regular forum** to provide feedback on proposed legislation, policies and mechanisms and other related issues and that the process is inclusive.
- Steps should also be taken to **prepare victims**, months ahead before official sittings, as to what the process and respective mechanisms entail, possible setbacks and exploration of ways to prevent re-traumatisation. This should also include measures to prevent stigmatisation of particular categories of victims.

The Government of Sri Lanka

- Ensure that **legislative reforms** provide for the centrality of victims including specific mention of issues of standing, participation and protection in the respective mechanisms committed to in 2015 and other mechanisms. Furthermore, immediate legislative reforms will be required in terms of the present legislation providing for victim and witness protection to ensure it meets international standards. Legislative reforms will also need to focus on introducing international crimes and other key aspects into domestic law, which is beyond the scope of this paper.¹²²
- Ensure the **accessibility** of all mechanisms. Buildings should be physically accessible and have special facilities for pregnant women and the disabled. Proceedings should be transmitted in English, Sinhala, and Tamil, and female translators should be hired in all three languages. Braille and sign language should also be available. Mechanisms should also be geographically accessible, which means they should have offices in all war-affected districts as well as Colombo and make provisions for funding for victim/witness transportation as needed. Public proceedings should be recorded and

¹²¹ See CPA, *Office on Missing Persons: Outstanding Issues for Consideration to Strengthen Legislation and Post-Enactment Implementation*; CPA, *Submission to the Consultation Task Force on Reconciliation Mechanisms by the Centre for Policy Alternatives (CPA)*.

¹²² See Fonseka & Ganeshathasan, *Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka*, CPA, January 2016; more on this will be discussed in a forthcoming paper to be issued in early 2017.

broadcast through online, radio, or television media. Mechanisms must ensure victims' privacy in live broadcasts and recordings. All public information should be electronically available and accessible to all. The judicial mechanism and TRC should consider organizing local screenings, as the Special Court for Sierra Leone did with the Charles Taylor trial.¹²³

- Ensure that the **architecture and design** of the buildings and physical spaces within the proposed mechanisms are perceived as being open to victims and not intimidating or reminiscent of buildings in which they were abused. Steps should be taken early on to engage with architects and others to make spaces safe and conducive to victim participation.
- Establish an **outreach** program for each mechanism to promote victim awareness and engagement and a **gender unit** to ensure that women's interests are represented.¹²⁴ Consider ways to get the media—mainstream and civic—more engaged with TJ when the processes commence.
- Provide robust **psychosocial** support and on-site **medical care**, which continues beyond the time when testimony is provided.
- Ensure that the **leadership and staff** of all four mechanisms includes representative numbers of women, war victims, the disabled, the LGBTQ community, members of all ethnic groups, linguistic communities, religious communities, and experts on economic, social, and cultural rights. Moreover, ensure that the **leaders** of this process, such as commission members, are people victims feel they can trust. Furthermore, steps should be taken to include victims in the process of **vetting** of commissioners, potentially through a public nominating process.
- Ensure there is **adequate funding** for victim/witness protection and all other victim-centered activities with the needs of victims receiving high priority in the budget for each mechanism.
- Prioritize **security-sector reform** to end ongoing torture and intimidation by intelligence services and police.
- Introduce legislative reforms including of the PTA and other existing legislation to ensure adherence to international standards.
- Consider best practices for **digital and physical archival of records**.
- The proposed mechanisms must be sensitive to **conflict prevention**, given the tensions that can arise within communities when people talk about past atrocities. Specific steps will need to be taken in advance to be prepared in this regard, including having a working relationship with respective civil society and other groups in particular areas who are able to identify possible situations that may result in/exacerbate tensions and conflict.
- **Government actors** at the local level should be made aware of the proposed mechanisms and issues around victim centrality, including potential roles particular

¹²³ Rachel Kerr and Jessica Lincoln, *The Special Court for Sierra Leone: Outreach, Legacy and Impact*, London: War Crimes Research Group, Department of War Studies, Feb. 2008, <http://www.rscl.org/Documents/sfinalreport.pdf>.

¹²⁴ Look at Sierra Leone's public outreach, which included songs on the radio about the proceedings. See Sharanjeet Parmar, Mindy Jane Roseman, Saudamini Siegrist, and Theo Sowa, eds., *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Cambridge, MA: Human Rights Program at Harvard Law School, March 2010, 174, https://www.unicef-irc.org/publications/pdf/tj_publication_eng.pdf.

officials are to play in the proposed mechanisms such as raising awareness and protection issues.

- Steps must also be taken to ensure that all web content meet **web standards on accessibility**, with special attention on how to make it accessible for particular groups including the visually impaired.
- Plan for the functioning of the proposed mechanisms at a future date and take practical steps in specific areas to ensure victims are not further marginalised or traumatised. For example, careful consideration will need to be given to issues such as the **uniform** of staff and security officials, ensuring they are not reminiscent of particular groups.
- Attention will need to be given to finances, including the option of establishing a trust fund to support victims. Furthermore, consideration must be given towards financial support for **victims' lawyers** if victims are to get standing before a tribunal. There should also be support for victims engaging directly with a judge, without lawyers present.
- In terms of the proposed special court, consideration of the option of **collective testimonies** as seen in comparative contexts, with steps taken to avoid possible legal and practical challenges.
- Steps must be taken for proposed mechanisms to be able to accept testimony from **victims residing overseas, foreign experts** and members of the **diaspora** in a secure way.

Victims and Victim Groups

- Examine ways of **influencing the design and implementation** of the Transitional Justice process, proposed legislation, mechanisms and other areas to have a holistic victim-centered approach meeting with international standards
- Explore modalities of preparation, participation, standing and protection in the context of future mechanisms

Civil Society

- **Advocate for robust victim centrality** in the Transitional Justice process and proposed mechanisms, providing concrete examples and approaches
- Raise awareness of best practices and international standards
- Support victims and victim groups to ensure there is active and sustained participation in mechanisms including supporting with legal and other resources

International Community

- International donors and groups should be reflective of the need to **promote victim centrality** in future processes and mechanisms including in terms of financial and technical resources.

Private Sector

- The private sector should be engaged with the **provision of technical support** for proposed mechanisms, especially communications companies, in terms of raising awareness and greater dissemination of information and other areas.